



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Maryland Assemblies, Inc.

File: B-236430

Date: November 17, 1989

DIGEST

Protest by manufacturer of allegedly defective fuzes against award of contract for rework effort to another firm is dismissed where award to protester would effectively require relinquishment of agency's right to assert claim against protester under its warranty clause.

DECISION

Maryland Assemblies, Inc., protests the award of letter contract No. DAAA09-89-C-0576 to Martin Electronics, Inc. for replacement of allegedly defective hand grenade fuzes originally supplied by the protester. The protester contends that the agency was required to permit Maryland Assemblies to compete for the correction and replacement work.

We dismiss the protest.

On January 30, 1987, the U.S. Army Armament, Munitions and Chemical Command awarded the protester contract No. DAAA09-87-C-0386 for production and delivery of 3.4 million hand grenade fuzes. That contract included the clause at Federal Acquisition Regulation (FAR) § 52.246-17, Warranty of Supplies of a Noncomplex Nature, by which the contractor warranted that the fuzes would be free from defects in material and workmanship and would conform to all requirements of the contract. That clause further provided that in the event the contractor breached the warranty, the contracting officer could, by contract or otherwise, correct or replace the nonconforming supplies from another source and charge any costs to the contractor.

In February 1988, the agency advised the protester that three production lots delivered by the firm had produced an

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unacceptable number of "duds". The protester made its own investigation of the problem, which it concluded was caused by, among other things, a buildup of contractually acceptable tolerances in fuze components, the specification of a varnish unsuitable for use with the primer, and the use of a pre-wound spring that did not properly work.

In April 1989, the agency nevertheless issued a cure notice, demanding that the protester repair or make arrangements to repair the defective fuzes. On May 4, the contractor responded in a letter declaring that it had followed the agency's design specifications in producing the fuzes and that it was not responsible for reworking the defective fuzes under the warranty clause. The protester further asserted that the total rework would cost \$1.4 million, that it was financially unable to absorb the cost of this effort while it pursued an appeal before the Armed Services Board of Contract Appeals, and that it would perform the rework effort only if the government first increased the contract price.

By letter dated July 18, the agency notified the protester that it intended to award a contract to Martin Electronics to rework the allegedly defective fuzes produced under the protester's contract. Maryland Assemblies filed a protest against this proposed award with the agency on July 21. On July 26, the protester submitted an offer to enter into a cost-plus-fixed-fee contract to repair the defective fuzes at an estimated cost of \$931,840. The protester has not alleged or shown that the agency received this offer prior to award. On July 26, the agency denied the protest of Maryland Assemblies and awarded a contract to Martin Electronics at a ceiling price of \$1.2 million.^{1/} Maryland Assemblies filed this protest with our Office on August 4.

The protester first denies that the fuze defects were attributable to any failure on its part; nevertheless, the protester contends that even when procuring the rework effort under a warranty clause, the agency has an obligation to obtain competition and must allow all responsible potential contractors to participate in the procurement. The protester points out that the agency has neither terminated its contract nor found the protester to

^{1/} On September 1, the contracting officer received approval to limit competition to Martin Electronics, based on unusual and compelling urgency. Such approval may be obtained after award. See Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(2), (f)(2) (Supp. IV 1986).

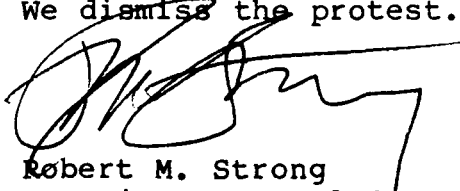
be nonresponsible and argues that it can perform the rework effort as quickly as can the awardee. The protester therefore concludes that the agency should have allowed Maryland Assemblies to compete for the contract.

The agency argues strongly that its exercise of the warranty clause is a matter of contract administration, which our Office does not review. In addition, the agency has submitted evidence that the employee who certified the protester's compliance with contract specifications has since been indicted and suspended from contracting for making false statements. The agency therefore apparently disputes the protester's assertion that the fuze defects were not the protester's fault.

Here, the agency made a determination to obtain the replacement quantity pursuant to the warranty provision of the protester's contract. While the protester offered to perform the rework, we note that Maryland Assemblies had, in its May 4 letter, effectively conditioned its performance upon relinquishment of the government's right to assert a claim against the firm. Specifically, the protester, in its May 4 letter, disputed that the rework was covered by the warranty clause under its contract and held the agency solely responsible for the defects which required rework. Its offer to perform was stated solely in this context.

Since this purchase is pursuant to the warranty clause under the protester's contract, we think the agency may reasonably refuse to consider award to a firm that would essentially require the agency to relinquish its contract rights under the warranty clause. Rather, since enforcement of a warranty is a matter of contract administration, the agency's sole obligation is to mitigate damages. Further, our Office will not entertain a protest concerning the agency's duty to mitigate damages since this is a subject for the disputes clause of the protester's contract. See generally Shelf Stable Foods, B-218067, Jan. 29, 1985, 85-1 CPD ¶ 120.

We dismiss the protest.



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